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No. 345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the Name of the UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

Petitioner,

v.

P. LEROY HARWOOD, as TRUSTEE IN BANKRUPTCY OF GROTON IRON WORKS and ISAAC SIEGEL and JOHN M. P. THATCHER, as Ancillary Receivers of United Steamship Company, Intervenors,

Respondents.

BRIEF FOR RESPONDENTS.

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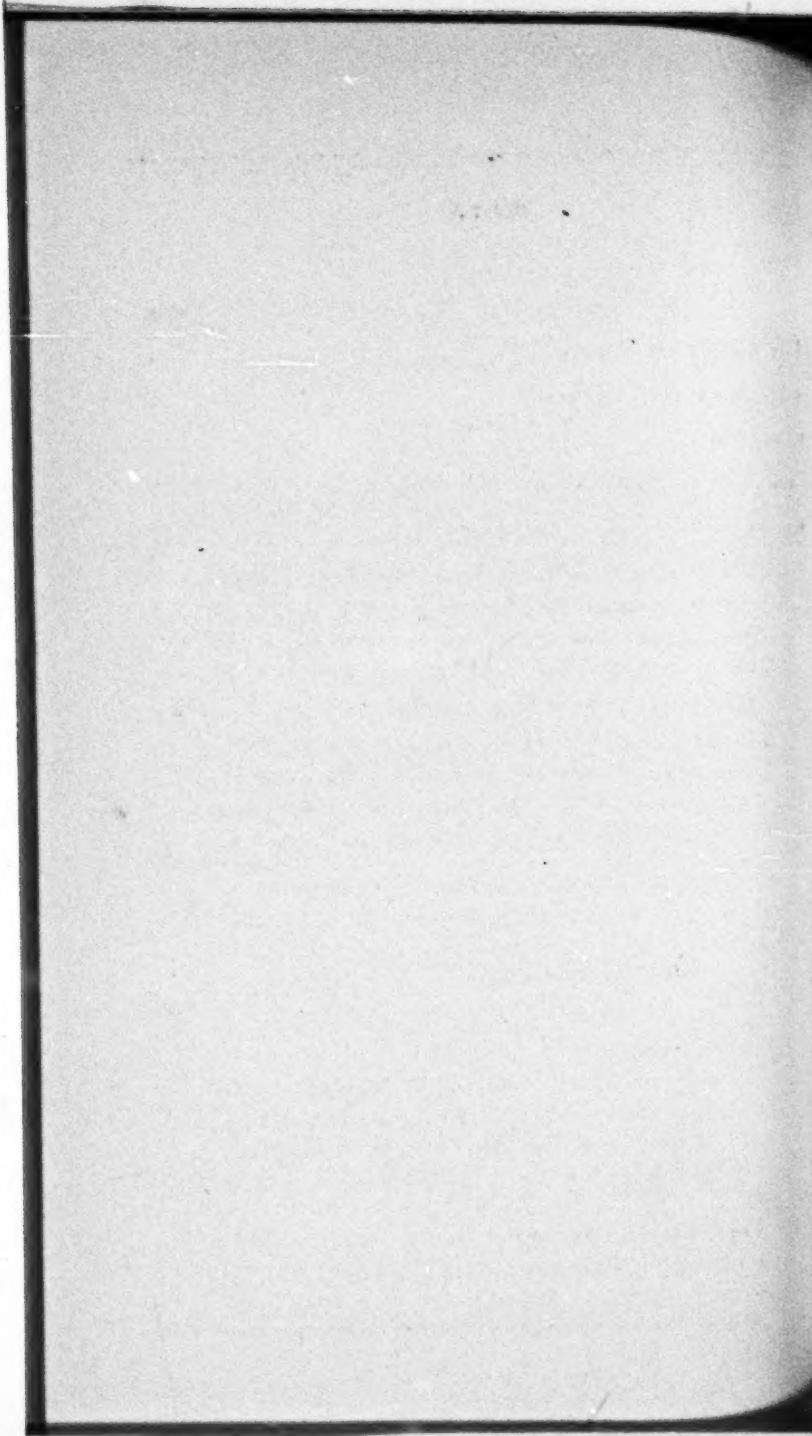


INDEX.

PAGE

THE OPINIONS BELOW 1

THE QUESTION PRESENTED 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. The contracts in question are identical in form and substance with those involved in the *Sloan* case and on their face were executed by the Fleet Corporation as principal and not as agent 7

1. The three original construction contracts are identical with those in the *Sloan* case and on their face were the contracts of the Fleet Corporation and not of the United States.. 8

2. In executing the supplemental contract of September 30, 1918, modifying the wooden ship contract of June 15, 1917, the Fleet Corporation contracted in the same capacity, i. e., as principal..... 10

3. The fifth contract, to wit, that of March 26, 1920, on which, under the opinion of the court below, the accounting must proceed, is likewise on its face the contract of the Fleet Corporation 11

II. The Fleet Corporation was liable on contracts made in its own name, even if acting for the United States, in furtherance of the purposes of the Act of June 15, 1917 and under powers delegated thereunder 21

PAGE

1. The contention that this case is distinguishable from the *Sloan* case upon the ground that all that was determined therein was that the Fleet Corporation was suable on such contracts is inconsistent with the decision in that case and with its reasoning.... 21

   (a) The first case (the *Sloan* case)..... 22

   (b) The second case (the *Astoria* case)... 23

   (c) The third case (the *Eastern Shore* case) 25

   (d) Each of the three cases decided rests upon a common ground, namely, that the substantive rights and obligations of the Fleet Corporation under contracts such as these were those of a principal..... 27

2. The respondents' contention is sustained by subsequent decisions of this Court and by the decision of every circuit court of appeals which has passed upon the question..... 29

3. The hardship resulting from the long lapse of time since the decision in the *Sloan* case, during which this and similar claimants have proceeded on the supposed authority of the *Sloan* case, as interpreted in the foregoing decisions, and have become barred from prosecuting their claims against the United States in the Court of Claims, is suggestive that the Sloan case and the decisions interpreting it should be neither overruled nor qualified except for the most cogent reasons 33

4. The decision of the court below is not in conflict with the cases cited by the petitioner, but is in harmony with settled prin-

PAGE

ciples of law governing liability of an agent (whether private or public) contracting as principal, and is consistent with the congressional and executive purpose in choosing a private corporation as the agency for the exercise of powers conferred by the Act of June 15, 1917 35

III. The liability of the Fleet Corporation is unaffected by the Merchant Marine Act of June 5, 1920 42

APPENDIX i

A. Urgent Deficiency Act of June 15, 1917, c. 29, 40 Stat. 182-183, 217 i

B. Executive Order, July 11, 1917..... ii

C. Executive Order, December 3, 1918..... iv

D. Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988-989, 990, 993..... vi

CITATIONS.

Cases:	PAGE
Astoria Marine Works v. *Fleet Corporation*, 295 Fed. 415	32
Cohn v. *United States Shipping Board*, 20 Fed. (2d) 56	31
Cook v. *Irvine*, 5 Serg. & R. 492 (Sup. Ct. Pa.)	36
Cox v. *Lykes Bros.*, 237 N. Y. 376	31
Crowell v. *Crispin*, 4 Daly (N. Y.) 100	36
Davis v. *Pringle*, 268 U. S. 315	27
Dietrich v. *Fleet Corporation*, 9 Fed. (2d) 733	31, 35
In re Eastern Shore Shipbuilding Corp., 274 Fed. 893	25
Eichberg v. *Fleet Corporation*, 273 Fed. 886; 14 Fed. (2d) 248	31
Fleet Corporation v. *Banque Russo Asiatique, etc.*, 286 Fed. 918	31
Fleet Corporation v. *Galveston Dry Dock*, 13 Fed. (2d) 607	32
Fleet Corporation v. *Rosenberg Bros. & Co.*, 12 Fed. (2d) 721	31
Fleet Corporation v. *South Atlantic Dry Dock*, 300 Fed. 56	31, 32
Fleet Corporation v. *Tabas*, 22 Fed. (2d) 398	31, 35
Fleet Corporation v. *Western Union Co.*, 275 U. S. 415	40
Florida Grain Co. v. *Fleet Corporation*, 300 Fed. 169	31
Gill v. *Brown*, 12 Johnson 385	35
Haines v. *Lone Star Co.*, 268 Pa. 92	31
Hodgson v. *Dexter*, 1 Cranch 345	35, 41

PAGE

Lake Monroe, The, 250 U. S. 246.....34, 37, 38, 39
Nassau S. & R. Works v. *United States*, 266 U. S. 101 46
Nichols v. *Moody*, 22 Barbour 611..... 35
Ogden v. *Raymond*, 22 Conn. 379..... 36
Parks v. *Ross*, 11 How. 362..... 35
Providence Corp. v. *Downey Shipbuilding Corp.* 294 Fed. 641 .....30, 34
Providence v. *Miller*, 11 R. I. 272..... 36
Shooters Island Co. v. *Standard Corp.*, 293 Fed. 706; 3 Fed. (2d) 1022..... 31
Sloan Shipyards v. *United States*, 258 U. S. 549 1-2, 4-9, 11-13, 16, 20, 21-30, 32, 33, 34, 35, 36, 40, 46
Skinner & Eddy Corp. v. *McCarl*, 275 U. S. 1.. 39
Smith v. *Fleet Corporation*, 26 Fed. (2d) 337.... 30
Timken v. *Tallmadge*, 54 N. J. L. 117..... 36
Traylor Engineering Co. v. *Fleet Corporation*, 277 Fed. 248 31
United States v. *Alabama R. R. Co.*, 142 U. S. 615 40
United States v. *Matthews*, 282 Fed. 266.....31, 32
United States v. *Pfitsch*, 256 U. S. 547..... 46
United States v. *Skinner & Eddy Corp.*, 35 Fed. (2d) 889 32
United States v. *Strang*, 254 U. S. 491..... 34
United States v. *Wood*, 290 Fed. 109; 263 U. S. 680 .....29, 30, 34
Walker v. *Swartwout*, 12 Johnson 444..... 35
Whan v. *Green Star S. S. Corp.*, 22 Fed. (2d) 483 30
Whitney v. *Wyman*, 101 U. S. 392..... 36
Woodbridge v. *Hall*, 47 N. J. L. 388..... 36
Wright v. *Fleet Corporation*, 285 Fed. 647..... 31

Statutes: PAGE

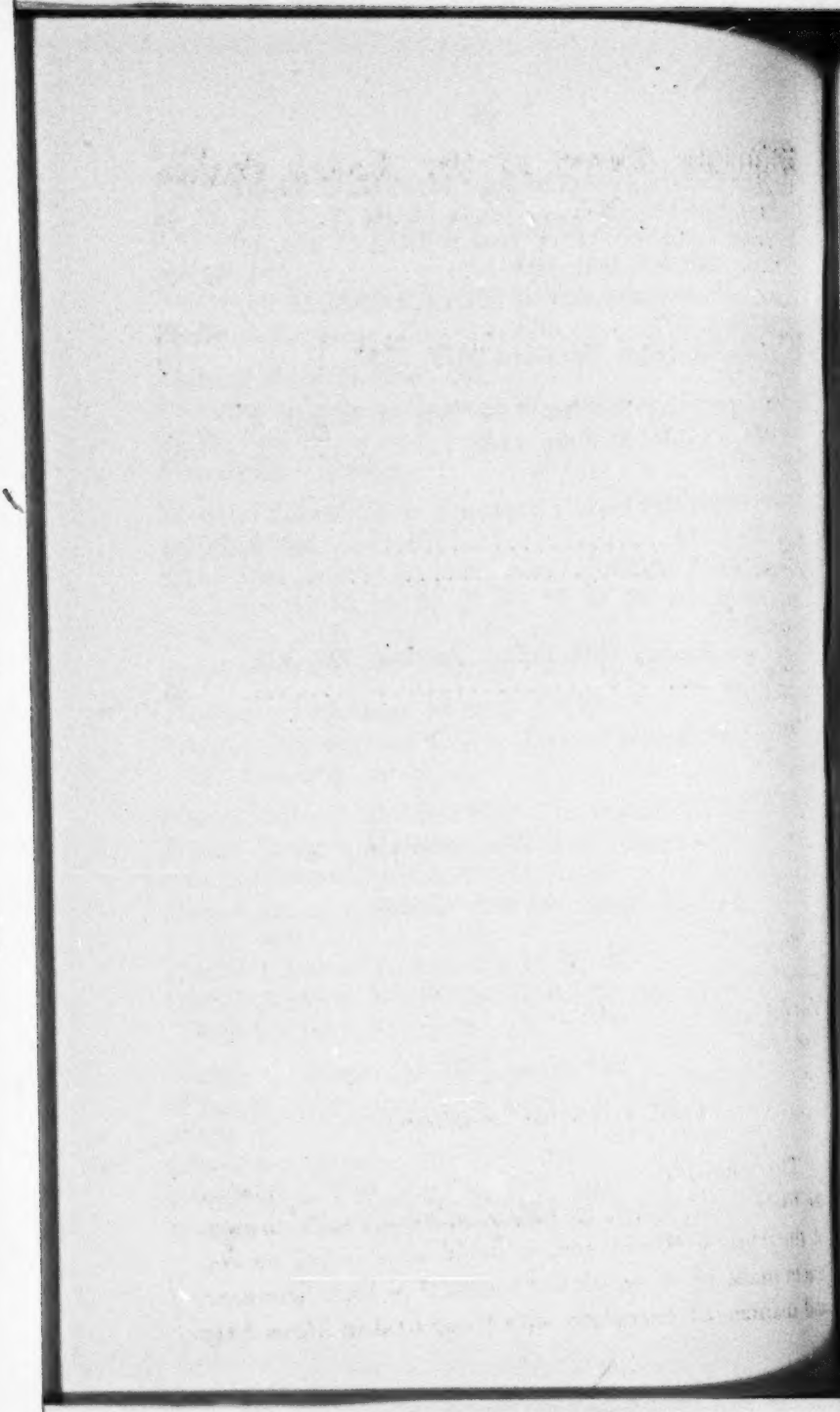
Urgent Deficiency Act of June 15, 1917, C. 29, 40 Stat. 182-183, 217....2, 5, 6, 11, 16, 21, 22, 24, 37, 43
Merchant Marine Act of June 5, 1920, C. 250, 41 Stat. 988-989, 990, 993.....6, 42, 46
Suits in Admiralty Act of March 9, 1920, C. 95, 41 Stat. 525 ..... 46, 48
Revised Statutes, Sections 3477, 3737..... 10

Judicial Code, Section 154, Act of March 3, 1911, C. 231, 36 Stat. 1138..... 33

Executive Orders:

July 11, 1917.....2, 8, 21, 24
December 3, 1918..... 2

Text Book:
Story on Agency (9th Edit.), Sections 302, 303, 306 36



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Respondents.

BRIEF FOR RESPONDENTS.

THE OPINIONS BELOW.

The opinion of the District Court (R. 312-318) is reported in 26 Fed. (2d) 116; and the opinion of the Circuit Court of Appeals (R. 338-343) is reported in 32 Fed. (2d) 680.

THE QUESTION PRESENTED.

The sole question presented in this case is whether the Fleet Corporation contracted as principal, or as agent of the United States, and is liable as principal on contracts made by it, which are identical in form, substance and manner of execution with those held in *Sloan Ship-*

yards v. *United States*, 258 U. S. 549, to be contracts of the Fleet Corporation and not of the United States.

STATEMENT.

The Emergency Shipping Fund provisions of the Urgent Deficiency Act of June 15, 1917 (40 Stat. 182)*, authorized the construction of ships at a cost not to exceed $500,000,000, and empowered the President (1) to place orders therefor, and (2) to exercise the powers conferred through such agency or agencies as he might determine. By Executive Order dated July 11, 1917† the President delegated to the Emergency Fleet Corporation the powers so conferred, insofar as applicable to the construction of vessels, and by further Executive Order of December 3, 1918‡ confirmed such delegation and ratified all acts theretofore done thereunder.

Prior to the date of the first Executive Order and on June 15, 1917 the Fleet Corporation contracted with Groton Iron Works (of which respondent Harwood is Trustee in Bankruptcy) for the construction of twelve wooden hulls at the latter's Noank Yards (R. 36), later reduced to eight by a supplemental contract dated September 30, 1918 (R. 44). On August 11, 1917 and on April 20, 1918 respectively the Fleet Corporation entered into two other contracts with Groton, each for the construction of six steel ships, at its Groton Yard (R. 48, 59).

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*Text set forth in the Appendix, post, at page i.
†Text set forth in full in the Appendix, post, at page iii.
‡Text set forth in full in the Appendix, post, at page iv.

On March 26, 1920, the parties entered into another contract supplemental to each of the four preceding contracts (R. 75). At that time five of the eight wooden ships and six of the steel ships had been delivered and three additional steel ships were nearing completion. This contract provided (1) for the cancellation of so much of the preceding contracts as called for the construction of the uncompleted vessels with the exception of the three steel ships nearing completion, (2) for readjustment of steel ship prices and (3) for the settlement of certain disputes that had arisen under the preceding contracts. Except as expressly modified thereby, the preceding contracts were to remain in full force and effect (Article XVII, R. 89). As a result, a receivership, which had intervened, was lifted and Groton resumed possession of its own yards, as stated in petitioner's brief (p. 7), although this circumstance is not material to any issue presented in this Court.

On July 11, 1923 Harwood, Trustee in Bankruptcy of Groton, filed a bill against the Fleet Corporation (R. 15) to set the contract of March 26, 1920 aside for duress, fraud, and mutual mistake of fact and for an accounting on the original construction contracts, or in the alternative, for an accounting under the contract of March 26, 1920 itself.*

The Fleet Corporation, in addition to tendering the general issue, interposed special defenses. Those num-

*As appears from the record and from petitioner's brief (p. 8) the suit in which this bill was filed was originally instituted by Groton, prior to its bankruptcy, as an action at law in the State Court, and removed to the United States District Court where, upon stipulation, it was transferred to the equity side (R. 14). Following this, the Trustee filed his new bill of complaint, as stated in the text, on which the suit proceeded (R. 15).

bered "First" and "Fourth" were severed from the remaining issues, and referred to a Special Master (R. 99).

In the Fourth Separate Defense the Fleet Corporation alleged that it had acted solely as an agent of the United States under powers delegated to it by the President under the Act of June 15, 1917, and had assumed no personal liability under the contracts made (R. 95). Upon this issue the Master found against the Fleet Corporation *on both the law and the facts* (R. 113).

Its First Separate Defense (R. 93) pleaded the contract of March 26, 1920 as an accord and satisfaction of all previously existing claims and demands, etc., arising under the preceding construction contracts, and was sustained by the Master (R. 113).

Although the contracts were in all respects similar to those reviewed in the *Sloan* case, the District Court sustained the Fleet Corporation's exceptions to the Master's Report in respect of the Fourth Separate Defense, overruled Groton's exceptions in respect of the First Separate Defense, and dismissed the bill (R. 318).

On appeal the Circuit Court of Appeals affirmed the decision of the District Court in respect of the First Defense, but, reversed it as to the Fourth Defense, holding that the Fleet Corporation executed the contracts in question as principal and was liable thereunder as such, and that hence an accounting should be had on the settlement contract of March 26, 1920 (R. 338). As will appear from the facts stated in the argument, the accounting to be had is governed in its most important particulars by the unmodified provisions of the preceding contracts, to which this contract was supplemental.

SUMMARY OF ARGUMENT.

I. The contracts in question are identical in form and substance with those involved in the *Sloan* case and on their face were executed by the Fleet Corporation as principal and not as agent. (Post, page 7).

(1) The three original construction contracts are identical with those in the *Sloan* case and on their face were the contracts of the Fleet Corporation and not of the United States. (Post, page 8).

(2) In executing the supplemental contract of September 30, 1918, modifying the wooden ship contract of June 15, 1917, the Fleet Corporation contracted in the same capacity, i.e., as principal. (Post, page 10).

(3) The fifth contract, to wit, that of March 26, 1920, on which, under the opinion of the court below the accounting must proceed, is likewise on its face the contract of the Fleet Corporation. (Post, page 11).

II. The Fleet Corporation was liable on contracts made in its own name, even if acting for the United States, in furtherance of the purposes of the Act of June 15, 1917, and under the powers delegated thereunder. (Post, page 21).

(1) The contention that this case is distinguishable from the *Sloan* case upon the ground that all that was determined therein was that the Fleet Corporation was suable on such contracts is inconsistent with the decision in that case and with its reasoning. Each of the three cases de-

cided in the *Sloan* case rests upon a common ground, namely, that the substantive rights and obligations of the Fleet Corporation under contracts such as these were those of a principal. (Post, page 21).

(2) The respondents' contention is sustained by subsequent decisions of this Court and by the decision of every circuit court of appeals which has passed upon the question. (Post, page 29).

(3) The hardship resulting from the long lapse of time since the decision in the *Sloan* case, during which this and similar claimants have proceeded on the supposed authority of the *Sloan* case, as interpreted in the foregoing decisions, and have become barred from prosecuting their claims against the United States in the Court of Claims, is suggestive that the *Sloan* case and the decisions interpreting it should be neither overruled nor qualified except for the most cogent reasons. (Post, page 33).

(4) The decision of the court below is not in conflict with the cases cited by the petitioner, but is in harmony with settled principles of law governing the liability of an agent (whether private or public) contracting as principal, and is consistent with the congressional and executive purpose in choosing a private corporation as the agency for the exercise of powers conferred by the Act of June 15, 1917. (Post, page 35).

III. The liability of the Fleet Corporation is unaffected by the Merchant Marine Act of June 5, 1920. (Post, page 41).

ARGUMENT.

I.

THE CONTRACTS IN QUESTION ARE IDENTICAL IN FORM AND SUBSTANCE WITH THOSE INVOLVED IN THE *SLOAN* CASE AND ON THEIR FACE WERE EXECUTED BY THE FLEET CORPORATION AS PRINCIPAL AND NOT AS AGENT.

In *Sloan Shipyards* v. *United States,* 258 U. S. 549, the Court held that the contracts there under review were on their face contracts of the Fleet Corporation and not of the United States, because executed by the Fleet Corporation in its own name and because the undertakings assumed and the rights acquired were expressed to be assumed, or acquired, by the Fleet Corporation, in its own name, and not in the name of the United States. It was further pointed out that the distinction between the Fleet Corporation and the United States was marked in the contracts themselves.

Each of the contracts involved in this case is identical in form and substance with those so construed.

Five related contracts are involved. The petitioners would have the Court confine its attention to the last, that of March 26, 1920, under which the respondent is entitled to an accounting under the decision of the court below. This contract was expressly declared to be supplemental to the preceding contracts. While it settles certain disputes, and in some respects readjusted the rights and obligations of the parties, the accounting to be had thereunder is to be governed in its most

important particulars by the unmodified provisions of the contracts to which it is supplemental. This contract, like those which preceded it, is believed to be on its face the contract of the Fleet Corporation and not of the United States. In any event, it was clearly executed by the Fleet Corporation in the same capacity, and if there be any uncertainty as to whether in its execution the Fleet Corporation contracted as principal or agent, such ambiguity must be resolved by a determination of the capacity in which it executed the contracts to which it was supplemental. For all of these reasons it is necessary, therefore, to consider the preceding contracts as well as that under which the accounting is to be had.

1. The three original construction contracts are identical with those in the *Sloan* case and on their face were the contracts of the Fleet Corporation and not of the United States.

The wooden ship contract (R. 36) was executed June 15, 1917, and before the first Executive Order of July 11, 1917, delegating to the Fleet Corporation powers conferred upon the President by the Act of June 15, 1917. In executing this contract, therefore, the Fleet Corporation could not have been exercising such powers but was contracting in its own name as principal solely under the powers derived from its certificate of incorporation (R. 251).

In this contract and in the first steel ship contract, executed after such delegation (R. 48), the Fleet Corporation is described as the owner for whom the vessels were to be constructed. All obligations of the contractor

run to the owner so designated and all obligations running to the contractor are in express terms assumed by the owner. Each was executed by the Fleet Corporation in its own name. The only mention of the United States in either is in a provision common to both (Article III, Ex. 1, R. 40; Article III, Ex. 3, R. 53) defining the rights of the contractor in the event of "delay * * * of the *owner*, or by reason of alterations or additions by the *owner*, or the commandeering by the *United States* Government of materials" etc. (italics ours) thus marking the distinction between the owner and the United States.

The second steel ship contract (Ex. 4, R. 59) differs from the two preceding contracts only in that it is recited as being between the contractor and "the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia (herein called the owner), representing the United States of America".

In *Sloan Shipyards* v. *Fleet Corporation, supra,* a similar recital was held to be without significance as bearing upon the question whether the contract was that of the Fleet Corporation or of the United States. This, it was held, must be determined by a consideration of its form and substance. The provisions of this contract are identical in form and substance with those reviewed in the *Sloan* case. As in that case, the undertakings of the party of the second part are expressed to be those of the Fleet Corporation designated as the owner, and it is the owner and not the United States who is to be satisfied with its performance and to whom the contractor's obligations run. In this contract as in the preceding contract, as well as in those in the *Sloan* case, the

distinction between the United States and the Fleet Corporation or owner is marked.

In this and in the two preceding contracts it was also provided that the contract might not be assigned without the consent of the owner (Fleet Corporation) but that payments due or to be due might be assigned for the purpose of obtaining credit for further construction (Article XII, Ex. 1, R. 43; Article XII, Ex. 3, R. 56; Article XI, Ex. 4, R. 69). Of these provisions the first would have been superfluous, if the contract had been with the United States of America, and the second void (R. S. 3737, 3477).

Each of the original construction contracts was, on its face, a contract with the Fleet Corporation and not with the United States and was executed by it in its own name as principal.

2. In executing the supplemental contract of September 30, 1918, modifying the wooden ship contract of June 15, 1917, the Fleet Corporation contracted in the same capacity, i.e., as principal.

The only mention of the United States in this contract (R. 44) is in the preamble which similarly describes the Fleet Corporation as "representing the United States".

The effect of this contract (R. 44) was (1) to reduce the number of hulls to be constructed to eight by cancelling four, (2) to release the contractor and the owner, respectively, from all obligations and liabilities arising from such cancellation, (3) to settle certain disputes which had arisen under the original contract and (4) to

modify the prices to be paid for the eight uncancelled hulls. It is declared in the preamble to be "supplementary" to the earlier contract (Ex. 2, R. 44) under which it is recited that the contractor had agreed to construct for the owner the wooden hulls described therein (R. 44). Except as so modified, it is expressly provided that "said contract of June 15, 1917, * * * is in full force and effect" etc. (Ex. 2, I (2), R. 44). In executing this supplementary contract the Fleet Corporation clearly contracted in the same capacity as in the original wooden ship contract to which it was supplemental and which was executed before any delegation of power to the Fleet Corporation under the act of June 15, 1917. In form and substance, as well as by reason of the circumstances and manner of its execution and its relation to the contract to which it was supplemental, it is the contract of the Fleet Corporation and not of the United States, under the decision in the *Sloan* case.

3. The fifth contract, to wit, that of March 26, 1920, on which, under the opinion of the Court below, the accounting must proceed, is likewise on its face the contract of the Fleet Corporation.

The preamble of this contract is as follows (R. 75):

> "Agreement made this 26th day of March, 1920, between the Groton Iron Works, a corporation organized and existing under the laws of the State of Maine (hereinafter called the contractor), party of the first part, and the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia, representing and acting

> in respect to all matters hereinafter contained for and on behalf of the United States of America (hereinafter referred to as the owner), party of the second part, witnesseth:"

This is essentially the same recital considered in the *Sloan* case and contained in two of the preceding contracts.

No importance is to be attached to the fact that in this contract the words "hereinafter referred to as the owner" follow the words "the United States of America". In the second steel ship contract the words "hereinafter called the owner" follow the words "Fleet Corporation" and before the recital. In the second wooden ship contract they appear at the end of the preamble after the words "party of the second part". In the contract now under review they appear after the recital of representation but before the words "party of the second part". The office of these words was clearly the same in all three, namely, to provide a short designation for the party of the second part whenever referred to in the body of the contract, just as the party of the first part is designated by its short title "the contractor".

Uncertainty, if any, as to the person designated as owner, arising from the placement of these words, disappears upon an examination of the contract. Like the preceding contracts, it was executed by the Fleet Corporation in its own name, and by Article XVII is expressly declared to be supplemental to the preceding contracts which, except as modified, "shall remain in full force and effect" (R. 85). Presumptively, at least, this supplemental contract by and between the same parties was

executed by the Fleet Corporation in the same capacity as the preceding contracts, viz., as principal.

That "the owner" described in the preamble, is the Fleet Corporation and not the United States appears from almost every article of the contract itself.

Article II (*a*) refers to two mortgages given by the contractor to "the owner" to secure loans made by the "owner". These mortgages were mortgages given to the Fleet Corporation *eo nomine* without mention of the United States and for loans made by the former (Defendant's Exhibits A and B., R. 219, 220) later assigned to the United States but not until April 16, 1923 (Defendant's Exhibit M., R. 222). By paragraphs (*d*), (*e*) and (*f*) of the same article (R. 77) the contractor remains bound "by all valid existing obligations * * * to the owner" but releases "the owner" from all of its obligations arising out of contracts 57 and 225 (the steel ship contracts), except as otherwise specified. These obligations were obligations arising in favor of or against the Fleet Corporation, out of the preceding contracts. As in the *Sloan* case the distinction between the owner, Fleet Corporation and the United States is marked in paragraph (*h*) of this Article (R. 78), reading:

> "(h) The title to hulls 7 to 9 is and shall remain in the *United States of America,* and title to all material, machinery, and/or equipment now or hereafter in the Groton yard of the contractor and intended for the construction and outfitting of said hulls is and shall remain in the *owner,* but nothing herein shall impair or affect the rights of the contractor to a credit for any of such material as provided by Article VIII hereof" (Italics ours).

Article IV (R. 79) increasing the prices to be paid for the steel ships provides that in the payment thereof "the owner" is to be credited with "payments and advances and charges herein provided to be made or *heretofore made by the owner*" (IV. (*a*)) (italics ours). This refers, of course, to payments made by the Fleet Corporation under the preceding contracts.

Article V (R. 80) provides that the owner shall pay the actual cost of building the three steel ships remaining to be completed, but not exceeding the difference between $16,155,648 and "amounts heretofore paid by the owner" (V, 1); and that in the computation of such cost all such charges "as may *have been* * * * made by the owner * * * in connection with the ship construction contracts," etc. shall be included and "the owner" shall be credited with "credits heretofore accrued in connection with any transaction related to ship construction activities" etc. (Article V, 3, (*b*), (*c*)). No one but the party to the preceding contracts (the Fleet Corporation) could possibly have been referred to in these provisions.

This article also provides that the "owner" shall make the payments specified "through its District Office" (Article V, 1; R. 80) and paragraph 4 (R. 81) of this article further provides:

> "Any amount of money in excess of that to be furnished by the Fleet Corporation needed to complete the said vessels shall be furnished by the contractor."

The District Office was that of the Fleet Corporation, while paragraph 4, quoted above, definitely identifies the

Fleet Corporation as the "owner" by whom the payments required by the same article are to be made.

Articles VIII and IX again provide for crediting the "owner" with the amounts "heretofore charged by the owner" (Article VIII, 2, R. 82) and with payments or advances theretofore made by it (Article IX, R. 82), under the preceding contracts, which were the contracts of the Fleet Corporation.

If there be any doubt as to the person referred to as the owner, such doubt would appear to be entirely set at rest by Article X (R. 83) which plainly establishes the identity of the owner and the Fleet Corporation; and reading as follows:

> "Representative of Fleet Corporation
>
> "The *owner* shall appoint and pay the salary of a competent representative to be stationed at the plant of the contractor. The duties of such representatives shall include the approval of all vouchers covering disbursements in connection with this agreement and also the functions of referee in connection with the settlement of questions arising thereunder as to the approval of vouchers." (Italics ours.)

Paragraph 2 of Article XII (R. 84), providing for payment of the completed wooden ships and for reconciliation of the accounts of the owner and the contractor again makes it plain that it is the Fleet Corporation which is described in the contract as the owner, the owner to pay any amount found due by it to the contractor. The accounts to be reconciled were of the Fleet Corporation and the contractor. The contractor had no accounts with the United States.

From the foregoing, it may not be doubted that the person described in the preamble as the owner is the person with whom the preceding contracts had been made, and that this contract was executed by the Fleet Corporation in the same capacity as were they. As it executed the preceding contracts as principal, it executed this contract in the same capacity. Furthermore, with the identity of the owner clearly revealed, the rights acquired and the obligations assumed, as in the *Sloan* case, were those of the Fleet Corporation and not of the United States.

The conclusions to be drawn from the contracts as a whole are not destroyed by the fact that the contractor agreed among other things, to accept the considerations moving to it on account of cancellation of so much of the contracts as called for the construction of uncompleted ships, as "just compensation." Petitioner argues that since only the United States had the power to cancel contracts and was under the duty of awarding just compensation, the contract must have been that of the United States.

But these ships were not "cancelled" by the Shipping Board, by the Fleet Corporation or by the United States, in the sense that such cancellation was an exercise of the power of eminent domain under the Urgent Deficiency Act of June 15, 1917. They were voluntarily cancelled by agreement of the parties to the original contract, in the same way that any private contracting parties may provide for the cancellation of existing obligations. They were voluntarily cancelled in consideration of the amounts agreed to be paid on account thereof. Under these circumstances the United States was under

no duty to make just compensation, a duty which arose only upon the cancellation of contracts *in invitum*.

It was competent for the parties to the original contract to fix the consideration or compensation to be paid on account of a cancellation of a part of such contracts by mutual consent. The fact that it is described as just compensation is wholly insufficient to convert this contract, in form and substance that of the Fleet Corporation, into a contract of the United States. Moreover the payments to be received are also described as amounts to be accepted "in accord and satisfaction for the said suspension and cancellation" etc. (Article III, R. 78).

The words are unimportant. It is the substance that counts. And the substance of the transaction was that the parties to the old contracts agreed that they should be in part cancelled and fixed the consideration therefor.

Furthermore, undue emphasis is given in petitioner's brief to cancellation features of this contract. The contract also provided for a readjustment of the prices to be paid for the construction of the steel ships, including both those already completed and the uncancelled ships to be completed. Except for such readjustment of prices, the ships to be completed were to be completed in accordance with the provisions of the preceding contracts and the credits and debits allowed on both the completed and uncompleted ships in determining the amount to be paid by the Fleet Corporation for such ships were to be determined in accordance with the preceding contracts. Payments to be made for the completed wooden ships were to be made at the prices and in accordance with the provisions of the wooden ship contract and the sub-

sequent supplement thereto, by reconciliation of the accounts of the parties thereto. The cancellation of so much of the contracts as provided for construction of the uncompleted vessels was therefore but one feature of this contract, a feature having but little effect upon the accounting to be had thereunder, under the decision of the court below. No accounting proceeding is required to determine the amount due to the contractor on account of such cancellation since the consideration moving to it therefor is definitely stated in the contract. The necessity for an accounting arises under the complicated accounts involved in determining credits to which the Fleet Corporation was entitled in determining the amount remaining to be paid for the steel ships, and in determining the amount due for the construction of the wooden ships, all questions arising in connection therewith being questions arising under the preceding construction contracts, whose provisions in these respects were unmodified.

It was also appropriate for the Fleet Corporation to protect the Government by taking a release of all obligations of the Government as well as of the Fleet Corporation, in the same manner in which private contracts frequently contain provisions for the benefit of third parties, as well as of the contracting parties themselves. It does not follow that the contract is that of the United States any more than it follows that such a private contract is the contract of the third party for whose benefit certain clauses are inserted therein. Furthermore, the very release clause itself (R. 83, Article XII), upon which the Fleet Corporation relies, distinguishes between the United States and the Fleet Corporation, both in its

corporate capacity and as representing the United States, referring to itself specifically in each capacity.

Speaking of this very contract, petitioner's brief (pp. 18-19) says:

> "There are in the contract several references to 'the owner' so phrased as to imply that the Fleet Corporation regarded and referred to itself as 'the owner'. This confusion of identity and ownership can only be explained when it is remembered that up to the decision of this Court in the *Sloan-Astoria-Eastern Shore cases,* 258 U. S. 549, the officials and attorneys of the Fleet Corporation asserted and consistently maintained that the Fleet Corporation was an integral arm and branch of the Government, similar to the Navy Department or any other executive department or bureau."

These admissions are alone sufficient to show that the Fleet Corporation is the party designated as "the owner", and that it executed this contract in the same capacity in which it executed the preceding contracts.

They also afford a complete answer to the contention that the contract of March 26, 1920 was a novation whereby the United States was substituted as the contractor's obligor. If, as stated, the officers and attorneys of the Fleet Corporation, until the decision in the *Sloan* case, rendered long after this contract, thought that the Fleet Corporation and the United States were one, they could not have intended the contract of March 26, 1920 to have been a novation introducing an additional party, to wit, the United States, into the situation. Nor was it such. As stated by petitioner (Brief p. 33) one of the

requisites of a novation is the consent of all the parties to the substitution. Nowhere in the contract does the contractor agree to accept the substitution of the United States for the Fleet Corporation as its obligor. Nowhere does the United States agree to assume the existing obligations of the Fleet Corporation. Nowhere does the contractor agree to become bound to the United States in respect of the matters concerning which it was bound to the Fleet Corporation. As in the preceding contracts, there were but two parties to this contract, not three. Under petitioner's contention, one of these was the United States, the other Groton. If this be so, then the Fleet Corporation was not a party at all, although the four preceding contracts were with it.

If a novation had been intended whereby the previously existing liability of the Fleet Corporation as principal would be extinguished and the liability of the United States substituted therefor and accepted by the contractor, the contract would have so provided and the Fleet Corporation undoubtedly would have executed it both in its own name as principal and in the name of the United States as agent. This it did not do but executed this contract in the same capacity in which it had executed the others. This plainly appears from the foregoing analysis of the contract and from the quotation from petitioner's brief, which is an admission that in executing this contract the Fleet Corporation acted in the same capacity as before. The suggested novation is an afterthought, brought about by the decision in the *Sloan* case, had no foundation in fact and was entirely unthought of at the time.

II.

THE FLEET CORPORATION WAS LIABLE ON CONTRACTS MADE IN ITS OWN NAME, EVEN IF ACTING FOR THE UNITED STATES, IN FURTHERANCE OF THE PURPOSES OF THE ACT OF JUNE 15, 1917 AND UNDER POWERS DELEGATED THEREUNDER.

1. The contention that this case is distinguishable from the *Sloan* case upon the ground that all that was determined therein was that the Fleet Corporation was suable on such contracts is inconsistent with the decision in that case and with its reasoning.

This contention, besides being based upon an artificial and unwarranted distinction between suability and liability, is believed to be inconsistent with what was actually decided in the *Sloan* case, as well as with its reasoning.

In two of the three cases decided in the *Sloan* case, the question presented was the capacity of the Fleet Corporation to be sued under contracts so made. In the third (the *Eastern Shore* case) the question was one of substantive right, the Fleet Corporation asserting that an indebtedness which had accrued to it under one of these construction contracts was a debt due to the United States and hence entitled to priority.

The argument of the Fleet Corporation in each case was that it contracted not for itself as principal but as an agent of the United States, acting under powers delegated to it by the President by executive orders made under the act of June 15, 1917. Hence it argued that

the obligations assumed and rights acquired were those of the United States, as principal, and not of the Fleet Corporation. In each case the decision turned, not upon the relationship established by Act of Congress and the executive orders thereunder, but upon the question as to whether the contracts involved were those of the Fleet Corporation or of the United States. They were held to be those of the Fleet Corporation. The arguments to the contrary, now submitted, are the same as those then submitted and rejected.

(a) *The first case (the Sloan case).*

Two contracts were involved in this case, an original contract of May 18, 1917 and another which it was alleged the Fleet Corporation compelled the contractor to execute after the former had taken possession of the latter's yards on December 1, 1917. It was this contract that was sought to be set aside (Opinion 565). The second contract was thus entered into after the Act of June 15, 1917, and delegation of powers to the Fleet Corporation thereunder, and the Court points out the distinction between the powers possessed by the Fleet Corporation before and after such delegation. In the second contract, made after such delegation, the Fleet Corporation as in three of the contracts now under review, including the contract of March 26, 1920, is recited as "representing the United States". As in this case, the Fleet Corporation relied largely, if not entirely, on this recital, coupled with the delegation of power under the executive orders. In respect of such recital the Court said:

> "We attach no importance to the fact that the second contract, alleged to have been illegally ex-

> torted, was made with the Fleet Corporation 'representing the United States of America'. The Fleet Corporation was the contractor, even if the added words had any secondary effect. * * * " (p. 568).

This conclusion it reached from an examination of the contract itself, which it found to be on its face the contract of the Fleet Corporation as principal, and held that it was therefore suable thereon.

(b) *The second case* (*the Astoria case*).

The *Astoria* case was one for breach of a contract executed long after such delegation of power and containing a similar recital, in respect of which the Court said:

> " * * * This contract was made on February 1, 1919, when the character of the Fleet Corporation had been more fully developed and determined than in the previous case, and purported to be made with the Fleet Corporation, 'a Corporation organized and existing under the laws of the District of Columbia (herein called the "Corporation"), representing the United States of America, party of the second part.' Throughout the contract the undertakings of the party of the second part are expressed to be undertakings of the Corporation and it is this corporation and its officers that are to be satisfied in regard to what is required from the Iron Works. It is recognized that it may be necessary for the United States to exercise complete control over the furnishing of supplies to the Iron Works and it is agreed that if required by the Corporation 'and/or the United States' the Iron Works will furnish schedules, &c, &c. The whole frame of the instrument seems

> to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. * * * " (pp. 569-570).

So construing the contract and its legal effect, it held that the Fleet Corporation was suable thereon. That is to say, the Court held that the contract was that of the Fleet Corporation as principal and that as such it was suable thereon.

The Court's reference to the broadened powers of the Fleet Corporation at the time of execution of this contract, and to the recital contained therein, warrants the inference that in deciding that the Fleet Corporation was suable thereon, the Court assumed that in making this contract the Fleet Corporation was acting for the United States under the Act of June 15, 1917, and the executive orders thereunder, and in furtherance of the purposes of said Act. It is said in petitioner's brief (pp. 13, 14) that by reason of this recital, coupled with the Act of Congress and the executive orders thereunder, the contractor was charged with notice that it was dealing with a public agent and this was seemingly the purpose of the inclusion of this recital. So, however, were the parties to the *Astoria* case. Despite such recital, the Fleet Corporation was held to be suable because it had con-

tracted as principal, from which it necessarily follows that, if suable as principal, it is liable as such.

(c) *The third case (the Eastern Shore case).*

In this case the question was one of substantive right and not of the capacity of the Fleet Corporation to be sued. The contractor in that case had entered into a contract with the Fleet Corporation, again recited as representing the United States, which is shown by the opinion of the court below (274 Fed. 893, 895, 902) to have been made on August 22, 1918, after the delegation of powers hereinbefore described. Under this contract indebtedness had accrued to the Fleet Corporation, which asserted that such indebtedness was entitled to the preferences accorded to the United States because in executing the contract, out of which the indebtedness grew, the Fleet Corporation had acted, not as principal, but as agent for the United States. In holding that the claim arising under such contract was that of the Fleet Corporation and not of the United States, Judge Rogers, for the Circuit Court of Appeals of the second circuit said (274 Fed. 902):

> "It cannot be seriously contended, although the argument was addressed to us, that inasmuch as the Fleet Corporation was an agent of the government it could not be personally liable on its contracts, as agents are not personally liable on contracts made by them within the scope of their authority. We are told that a contract made in the name of a public agent will be construed to be a contract of the government, and not of the agent. Huffcut on Agency (2d Ed.) p. 254.

> This is to lose sight of the fact that the Fleet Corporation contracted as a principal in its contract with the bankrupt. It designated itself throughout the contract as owner, and was careful to distinguish between itself as owner and the United States, and the debt due from the bankrupt under the contract is a debt due to it as a principal, and not to the United States."

In affirming, this Court said (258 U. S. p. 570):

> "The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the District Court for the Southern District of New York, under a contract similar to that last described, made by that Company with the Fleet Corporation 'representing the United States of America' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. It was denied successively by the referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed. 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed."

The "considerations stated" were that contracts of the character under which this indebtedness arose were those of the Fleet Corporation because "the whole frame of

the instrument seems to us plainly to recognize the corporation as the immediate party to the contract" (Opinion, p. 569). That is to say, this Court, like Judge Rogers, held that the Fleet Corporation contracted as principal and not as agent, although in so doing, it may have acted as a public agent. If, on this account, the rights acquired by the Fleet Corporation were those of a principal, its liabilities were as clearly such.

It is true that since the *Sloan* case it has been held that the preferences of the United States extend only to claims for taxes. *Davis* v. *Pringle*, 268 U. S. 315. Hence even if the claim had been that of the United States it would not have been entitled to the priority asserted. It had not been so decided at that time, and although the three dissenting Justices concurred in the decision in the *Eastern Shore* case on this ground, the majority of the Court did not put its decision on such ground but upon the ground that the contract was that of the Fleet Corporation.

In view of the fact that this case involved a question of substantive right and not of capacity to sue, it is difficult to perceive how the Fleet Corporation can contend that only the capacity of the Fleet Corporation to be sued and not the nature of the substantive rights and obligations arising from contracts such as these was decided in the *Sloan* case.

(d) *Each of the three cases decided rests upon a common ground, namely, that the substantive rights and obligations of the Fleet Corporation under contracts such as these were those of a principal.*

It was on this account that the Fleet Corporation was held suable in the first two cases, and that the claim

asserted in the third was held to belong to it as principal and not to the United States. If this conclusion be sound, then the question of liability as well as suability was determined in these cases. If, on the other hand, it is not sound, it is difficult to perceive upon what theory they were decided.

As indicating the contrary, some reliance is placed on the following statement in the dissenting opinion of the late Chief Justice Taft, concurred in by Messrs. Justices Van Devanter and Clarke:

> "The opinion of the court is carefully drawn and if its conclusion is to rest merely on the nice distinction that it does not clearly appear from a proper construction of the pleadings that the acts here complained of were acts done under authority delegated by the President to the Fleet Corporation, as his agent, then the question I have been discussing and which seems to me to be in these cases is not here decided, and will only arise on answer and evidence." (p. 572).

It would seem that the inference to be drawn from this is just the reverse of that which the petitioner draws. It is true that the late Chief Justice states that if the opinion is to rest on the nice distinction stated (which is the distinction now sought to be made), the question discussed in the dissenting opinion is not decided. It is equally true that he states that that question that the Fleet Corporation contracted as principal (the liability of the Fleet Corporation) "seems to me to be in these cases". That is to say the late Chief Justice appears to have construed the necessary effect of the decision as we have. Reading the majority and dis-

senting opinions together, it seems to be reasonably plain that the question upon which the court divided, was that of the capacity in which the Fleet Corporation acted, and whether it bound itself as principal or not. This conclusion is strengthened by the comments made by the late Chief Justice in respect of the effect of the decision in placing the jurisdiction for suits such as these in the district and state courts instead of in the Court of Claims. The importance of the determination of the forum was not merely in respect of where suit might be instituted, but where judgment might be obtained, as indicated by the observations made in the dissenting opinion.

2. The respondents' contention is sustained by subsequent decisions of this Court and by the decision of every circuit court of appeals which has passed upon the question.

In *United States* v. *Wood,* 290 Fed. 109, the Circuit Court of Appeals for the Second Circuit dismissed a suit brought by the United States to obtain a preference in respect of a debt arising out of a similar contract. In so doing it said:

> " * * * The debt set forth in the complaint is one due, not to the United States, but to the Fleet Corporation as principal and independent contractor, * * * " (p. 115).

This Court affirmed (263 U. S. 680) in a *per curiam* opinion upon authority of *Fleet Corporation* v. *Wood* (title

of the last three cases in the *Sloan* case). In so doing it again held that the rights and obligations arising under such contracts were those of the Fleet Corporation as principal. The petitioner seeks to qualify the effect of this decision by something thereafter said about it by the Circuit Court of Appeals in *Whan* v. *Green Star SS. Corp.*, 22 Fed. (2d) 483. But in quoting therefrom petitioner fails to quote the immediately preceding paragraph in which that Court reiterated that the claim was not that of the United States but of the Fleet Corporation and was declared so to be by this Court as well as by it. In any event, *United States* v. *Wood* was specifically affirmed by this Court upon the authority of the *Sloan* case.

In *Providence Corporation* v. *Downey Shipbuilding Corporation*, 294 Fed. 641 (certiorari denied 264 U. S. 586), and in *Smith* v. *Fleet Corporation*, 26 Fed. (2d) 337 (certiorari denied 278 U. S. 628) the same Circuit Court of Appeals again held that the substantive rights and liabilities of the Fleet Corporation under contracts executed in its own name, although acting for the United States, were those of a principal. These cases are disposed of by petitioner (Brief, pp. 28-29) by the statement that they were decided by the same court whose decision is here being reviewed. This Court, however, also denied certiorari in both. While such denial is not equivalent to an affirmance, nevertheless, when the public character of the question involved is considered, and when it is recalled that these denials followed the decision in the *Sloan* case and in *United States* v. *Wood*, their denial would appear to have some significance in respect of the

interpretation placed by this Court upon its own decision in the *Sloan* case.

To the same effect are the decisions of every other circuit court of appeals, which has passed upon the question. *United States* v. *Matthews,* 282 Fed. 266 (9th C. C. A.), *Banque Russo Asiatique London* v. *Fleet Corporation,* 286 Fed. 918 (3d C. C. A.), *Shooters Island Shipyard Co.* v. *Standard Shipbuilding Corporation and Fleet Corporation,* 293 Fed. 706, 3 Fed. (2d) 1022 (3d C. C. A.), *Fleet Corporation* v. *Rosenberg Bros. & Company,* 12 Fed. (2d) 721 (9th C. C. A., reversed on other grounds, 276 U. S. 202), *Cohn* v. *Fleet Corporation,* 20 Fed. (2d), 56 (6th C. C. A.), *Fleet Corporation* v. *Tabas,* 22 Fed. (2d) 398 (3d C. C. A.), *Fleet Corporation* v. *South Atlantic Dry Dock,* 300 Fed. 56 (5th C. C. A.). See also an additional decision of the Second Circuit in *Dietrich* v. *Fleet Corporation,* 9 Fed. (2d) 733, and decision of the Court of Appeals of the District of Columbia in *Eichberg* v. *Fleet Corporation,* 273 Fed. 886, 14 Fed. (2d) 248. To the same effect are the following decisions of district courts, which went no higher, and of state courts: *Florida Grain & Elevator Co.* v. *Fleet Corporation,* 300 Fed. 169 (D. C., S. D. Fla.); *Haines* v. *Lone Star Shipbuilding Co.* (Fleet Corporation, Garnishee) 268 Pa. 92, 110 Atl. 788; *Cox* v. *Lykes Bros. and Fleet Corporation,* 237 N. Y. 376, 382; *Traylor Engineering & Mfg. Co.* v. *Fleet Corporation,* 277 Fed. 248 (D. C., E. D. Pa.); *Wright* v. *Fleet Corporation,* 285 Fed. 647 (D. C., S. D. N. Y.).

All these cases are disposed of by petitioner as being based upon an erroneous interpretation of the decision of

this Court in the *Sloan* case. Perhaps so. But their unanimity, although not binding on this Court, should be in some degree persuasive that it is the petitioner's interpretation of that case and not ours which is erroneous.

The only case to the contrary is an opinion by the District Court of Oregon cited by the petitioner, *Astoria Marine Works* v. *Fleet Corporation,* 295 Fed. 415, which is clearly in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit, cited above, as well as with the otherwise unbroken line of authority.

Petitioner's assertion that *Fleet Corporation* v. *Galveston Dry Dock Company,* 13 Fed. (2d) 607 (5th C. C. A.) is in conflict, is erroneous. An examination of the opinion discloses that the contract reviewed showed on its face that it was not the contract of the Fleet Corporation but of the Shipping Board, and in the last paragraph it is expressly stated that the question of the Fleet Corporation's liability on the contracts made in its own behalf is not presented. The same Court in *Fleet Corporation* v. *South Atlantic Dry Dock, supra,* held that it was personally liable under such a contract.

Equally erroneous is the suggestion that the recent decision of the Ninth Circuit in *United States* v. *Skinner & Eddy,* 35 Fed. (2d) 889, is in conflict with its prior decision in *United States* v. *Matthews, supra.* The *Skinner & Eddy* case was between the United States and the contractor, not between the Fleet Corporation and the contractor, and the claim asserted by the contractor being for just compensation on account of the cancellation of his contract was one exclusively cognizable by the Court of Claims.

3. The hardship resulting from the long lapse of time since the decision in the *Sloan* case, during which this and similar claimants have proceeded on the supposed authority of the *Sloan* case, as interpreted in the foregoing decisions, and have become barred from prosecuting their claims against the United States in the Court of Claims, is suggestive that the *Sloan* case and the decisions interpreting it should be neither overruled nor qualified except for the most cogent reasons.

Section 154 of the Judicial Code (United States Code, Title 28, § 260, R. S. § 1067, March 3, 1911, c. 231, § 154, 36 Stat. 1138) provides as follows:

> *"Claims pending in other courts excluded.* No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

By reason of this statute neither the respondent nor any other person similarly situated could concurrently sue the Fleet Corporation, suable only in a district or state court, and the United States, suable only in the Court of Claims. He was compelled to determine at his peril which course to pursue. Suit by respondent in the Court of Claims is now barred by the statute of limitations. It is said in the petition for certiorari (page 7)

that there are other cases pending involving the same question between other contractors and the Fleet Corporation. In view of the time which has elapsed since the conclusion of the War, it is fair to assume that the statute of limitations has likewise run in all such cases. The effect either of overruling the *Sloan* case or of the qualification suggested, therefore, would be to permit both the Government and the Fleet Corporation in this and all other similar cases to escape liability except upon such settlement as the Government was willing voluntarily to make.

The *Sloan* case was decided May 1, 1922. In deciding it, the Court said that the conclusion reached was "led up to and almost required by the decisions heretofore reached in *The Lake Monroe*, 250 U. S. 246 and *United States* v. *Strang*, 254 U. S. 491," in each of which the question was one of substantive law and not of capacity to sue or be sued.

In November, 1923, this Court decided *United States* v. *Wood, supra*. In 1924 it denied writ of certiorari in *Providence Engineering Corporation* v. *Downey Shipbuilding Corporation, supra*. As previously stated, in both of these cases the question was one of substantive right and not of capacity to be sued. Thereupon followed the multitude of cases cited above, similarly construing the opinion of this Court in the *Sloan* case and defining the substantive rights of the parties.

It is respectfully submitted that with this judicial history before him any lawyer required to elect between suing the Fleet Corporation or the United States would have sued the former, and that any lawyer adopting the contrary course would have been negligent in the protection of his client's interest. Now to qualify the de-

cision in the *Sloan* case, after the statute of limitations has run, would impose such a hardship upon claimants acting upon its supposed authority as to be suggestive, if not persuasive, that such qualification or reversal should not be made in the absence of the most cogent reasons.

4. The decision of the court below is not in conflict with the cases cited by the petitioner, but is in harmony with settled principles of law governing liability of an agent (whether private or public) contracting as principal, and is consistent with the congressional and executive purpose in choosing a private corporation as the agency for the exercise of powers conferred by the Act of June 15, 1917.

Hodgson v. *Dexter*, 1 Cranch 345, and *Parks* v. *Ross*, 11 How. 362, cited by the petitioner, were called to the attention of the Court in the *Sloan* case (brief of counsel for Fleet Corporation, 258 U. S., at p. 553) in support of the very argument now renewed. They were also referred to in the opinion of the Second Circuit in *Dietrich* v. *Fleet Corporation*, *supra*, and of the Third Circuit in *Fleet Corporation* v. *Tabas*, *supra*.

Moreover, *Hodgson* v. *Dexter*, *supra*, and *Parks* v. *Ross*, *supra*, do not lay down the rule that a public agent may not be personally liable on a contract made by him on account of the Government, but only that a presumption arises that a public officer contracting on behalf of the Government does not intend to bind himself personally. This presumption may be overcome. *Gill* v. *Brown*, 12 Johnson, 385; *Walker* v. *Swartwout*, 12 Johnson, 444; *Nichols* v. *Moody*, 22 Barbour, 611

(General Term, Sup. Ct. N. Y.); *Crowell* v. *Crispin*, 4 Daly (N. Y.) 100; *Woodbridge* v. *Hall*, 47 N. J. L. 388; *Timken* v. *Tallmadge*, 54 N. J. L. 117, 22 Atl. 996; *Cook* v. *Irvine*, 5 Serg. & R. 492 (Sup. Ct. Pa.); *Ogden* v. *Raymond*, 22 Conn. 379; *Providence* v. *Miller*, 11 R. I. 272. See also Story on Agency (9th Edit.), §§ 302, 303 and 306.

It is well settled that an agent may so contract as to become personally bound and that whether he has contracted as principal or agent is to be determined by the contract itself. *Whitney* v. *Wyman*, 101 U. S. 392. In executing contracts such as these which, in form and substance, as well as in manner of execution, were those of a principal, the Fleet Corporation became bound thereby as principal and any presumption which might otherwise have arisen by reason of its relations to the Government was completely overcome. This would appear to be the necessary effect of the decision in the *Sloan* case. Despite the statute, the executive orders and the recitals of representation, the contracts were held to be those of the Fleet Corporation, because they were in form and substance such, as well as because of their manner of execution.

After so stating, the Court said:

> "* * * The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. * * *" (258 U. S. 570.)

This is suggestive that the presumption arising in cases of contracts executed by a natural person, acting as

agent of the Government, did not attach to contracts executed by the Fleet Corporation. The Fleet Corporation was a private corporation, having the corporate capacity to contract as principal. As such it was chosen as the agency to be employed to carry out the purposes of the Act of June 15, 1917. The legislative history of this Act is persuasive that it was so chosen because it was a private corporation, capable of contracting as principal, free from the restrictions by which an individual agent or government officer acting for the Government would be bound. While the President was left free to choose the agency through which he would act, the Act itself expressly referred to the Fleet Corporation by name and it was apparently contemplated and understood that it would be chosen as such agency. *The Lake Monroe*, 250 U. S. 246, 254.

Contemplating this, the Act provides "that all moneys turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended." This provision, added in conference, was obviously for the purpose of permitting the Fleet Corporation, in the execution of powers which might be conferred upon it, to act as a private corporation, free from governmental restrictions in its operations. If there be any doubt that such was its purpose, such doubt is removed by the explanation thereof as contained in the statement made by Senator Underwood, reporting to the Senate for the conferees the Bill which became the Act of June 15, 1917. Senator Underwood said (Cong. Record, Vol. 55. 65th Congress, p. 3549; R. 261):

"I was told by Gen. Goethals that under the terms of this bill, if passed, he would be named as the agency, or rather that the emergency fleet corporation, of which he is general manager, would be named as the agency to expend this money. He desired the authorization to come in that way, for this reason. He said that it would give him a broader latitude in which to make his contracts. He could make them as a corporation, and not be bound by the requirements of law that would restrict his action if he made them as a governmental officer; in other words, if he is designated as a governmental officer he would probably have to publish advertisements for bids in many cases, while acting for a corporation he would not have to do so. As a governmental officer in carrying out this provision he would have to make many reports and be delayed by red tape and technicalities that would not embarrass him if he were carrying on the transaction acting for a corporation. Of course, the corporation is owned by the Government and controlled by the Government; the Government is the entire corporation; but he expressed to me his view that he would have a greater latitude."

In speaking of the President's delegation of authority to the Fleet Corporation, the Court in *The Lake Monroe* case said:

"* * * And when in fact he designated the Fleet Corporation to exercise those powers so far as they pertained to the construction of vessels and the requisitioning of vessels in process of construction, and the Shipping Board so far as they applied to the operation, management, and disposition of vessels, it is to be presumed that he did so because of the general powers that al-

ready had been conferred upon them by law, * * * ." (p. 254).

And so, when the Court said in the *Sloan* case that in choosing this private corporation as an agency "it was expected to contract and to stand suit in its own person", it was only voicing the apparent purpose both of Congress and the President, as well as the interpretation placed upon such action in *The Lake Monroe*. See also *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8, where it is pointed out that an important, if not the chief reason for so choosing the Fleet Corporation was to utilize its powers and its freedom from governmental restrictions as a private corporation to employ commercial methods in the performance of its delegated functions. It would therefore seem that the presumption arising in the case of contracts made by a public officer never arose in respect of contracts made by the Fleet Corporation, which were assumed to be its own contracts, unless specifically executed by it in the name of the United States, and as the latter's agent. Certainly, such presumption, if any, was entirely removed by the contracts themselves.

Furthermore, after the execution of these contracts, as well as in their execution, the Fleet Corporation acted as a private corporation in its dealings with Groton. It took as security for moneys loaned to Groton, mortgages on its property, in which there is no reference to the United States (R. 219, 220), and extended their payment by a written document referring in detail to the transaction involved in the making of the mortgages, containing no mention of the United States (Exhibit D, R. 220). In a suit instituted by the town of Groton to fore-

close a tax lien on the shipyard, the Fleet Corporation asked for judgment of foreclosure on such mortgages in its own name as principal, and not as agent, and without mention of the United States as a party in interest (R. 253). Thereafter, on April 18, 1923, it assigned these mortgages to the United States (Exhibit N, R. 224), for the consideration stated, without mention or reference to the United States except as assignee. There is nothing in the entire record indicating that it acted, at any time, otherwise than as principal.

Petitioner cites *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415, as a case in which the status of the Fleet Corporation has been considered. But the status of the Fleet Corporation was thoroughly understood by the Court when it decided the *Sloan* case. Its relations to the United States were before the Court and due account thereof taken in the decision. The question presented in the *Western Union* case was whether the Fleet Corporation was entitled to Government rates under the Post Roads Act. The Court held that it was. The opinion points out that for 55 years the Government rate had been extended to all sorts of Governmental agencies not technically departments of the Government, such as the Smithsonian Institute, the Pan-American Union, etc. Citing *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615, the Court held that the contemporaneous construction consistently placed upon the Act was not only persuasive but decisive of the case. As stated by the Court, the question was one of statutory construction, and the ruling was that the Fleet Corporation was a department of the Government within the meaning of the Post

Roads Act. The question of its liability under contracts made in its own name as principal was not before the Court. Furthermore, although an agency of the United States (as stated to be in that case), the Fleet Corporation is nevertheless liable on contracts made in its own name as principal, even under the rule of *Hodgson* v. *Dexter, supra.*

III.

THE LIABILITY OF THE FLEET CORPORATION IS UNAFFECTED BY THE MERCHANT MARINE ACT OF JUNE 5, 1920.

Petitioner argues that the effect of this Act (41 Stat. 988-989, 990, 993)* is to relieve the Fleet Corporation of liability under these contracts if executed by it as principal, and to substitute therefor the liability of the United States, to be enforced by suit in the Court of Claims. On the contrary, it specifically preserves any existing cause of action against the Fleet Corporation. While it provides (Section 2 (*b*) (1)) for the assumption by the Shipping Board of "all contracts or agreements lawfully entered into before" its passage, under the various statutes enumerated (a provision broad enough to cover these contracts), Section 2 (*b*) (2) expressly provides:

> "(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (*c*) of this section, as if this Act had not been passed."

Subdivision (*c*) upon which the petitioner relies is as follows:

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* The text of the relevant portions of the Merchant Marine Act of June 5, 1920, is set forth in the Appendix, post, at page vi.

"(*c*) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed."

It will be observed that the proviso providing for suit against the United States follows immediately after reference to the determination of payment of just compensation. The Emergency Shipping Fund provisions of the Act of June 15, 1917, in addition to conferring upon the President authority to contract through agencies of his choosing for the construction of ships, authorized him to modify, suspend, cancel or requisition contracts and to requisition plants and ships and provided that, upon the exercise of these latter powers, the United States should make just compensation to be determined by the President, conferring upon the owner the right, if dissatisfied, to accept 75% of the compensation so fixed and to sue the United States for such further sum as added thereto would provide just compensation. The first clause of subdivision (*c*) authorizing the Board to settle and liquidate matters arising out of the exercise of the President's powers, standing alone, would not have been

sufficient to transfer to the Board the power to fix just compensation conferred by the President upon the original Act. At least its sufficiency for this purpose would be open to question. This additional authority was therefore specifically conferred by the second clause, to which the proviso is attached and which clearly refers to the decisions of the Board in the determination of just compensation.

The phraseology of the proviso expressly excludes the interpretation placed upon it by the petitioner. The right to sue is to be the same as "if the decision had been made by the President of the United States under the acts hereby repealed". But the President of the United States, under the acts hereby repealed, had no authority to decide the amount due to a contractor under a contract made by the Fleet Corporation, even though acting under his executive orders in the execution of such contract. The principal, if not the only cases in which "under the Acts repealed" the President was empowered to make decisions on account of which, if dissatisfied, suit might be brought against the United States were cases involving the determination of just compensation. This it was provided should be made in the first instance by the President or by his delegated agent. With the repeal of the acts by which such authority was conferred and by which the right to sue the United States on account of such determination, if deemed inadequate, was accorded it became necessary to provide substitute machinery for that displaced by such repeal. This Congress did in express terms by providing that the "board instead of the President shall exercise" such powers and duties "relating to

the determination and payment of such just compensation" and by providing that any person dissatisfied therewith "shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed." There is no ambiguity in the proviso, which is expressly limited to suits for just compensation, where the party is dissatisfied with the determination which the President was originally empowered to make, a power transferred by this section to the Board. It is not susceptible, even by implication, of being interpreted so as to destroy the existing liability of the Fleet Corporation and existing remedies thereon, and to compel suits thereon to be brought against the United States in the Court of Claims.

Furthermore, if such be the interpretation to be placed upon the proviso of subdivision (*c*), its effect is completely to destroy the preservation of the remedies attempted to be preserved by paragraph (2). If decision of the Board means a decision by it in the adjustment, settlement and liquidation of any or all matters arising out of the contracts, which by paragraph (1) it was directed to carry out, then none of the remedies accruing under such contracts and referred to in paragraph (2) were preserved. Petitioner's interpretation of the proviso of subdivision (*c*), therefore, is completely destructive of paragraph (2).

Finally, if Congress had intended any such unusual result as the extinction of the Fleet Corporation's liability, it would have done so by direct enactment and not by the backhand method attributed to it by petitioner.

And certainly it would not have gone through the form of preserving all existing remedies growing out of such contracts in one section of the Act and then destroy them in a succeeding section by requiring a decision of the Board and limiting the contractor to a suit against the United States which could be instituted only after such decision.

It is also said that by the Merchant Marine Act of 1920 Congress stripped the Fleet Corporation of all property and cannot be assumed to have preserved a mere naked right to obtain a judgment against an agent having no means of satisfying it. The same argument was made in the *Sloan* case and was disposed of by the Court in the following language:

> "* * * The transfer of the property of the Fleet Corporation to the Shipping Board by the Act of June 5, 1920, c. 250, § 4, 41 Stat. 988, 990, may affect the value of the remedy afforded by the present suit but not the jurisdiction of the Court" (p. 568).

United States v. *Pfitsch*, 256 U. S. 547 and *Nassau Smelting & Refining Works* v. *United States*, 266 U. S. 101, cited by petitioner, have nothing in common with this case. The first was a just compensation case arising under the Lever Act, and the second under the Dent Act. This is not a just compensation case but a suit to enforce contractual liability of the Fleet Corporation on contracts made by it.

Nor is petitioner's case aided by reference made to suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525), and decisions thereunder. That Act

provides in terms for the substitution of new remedies for old in respect of vessels belonging to the United States. The new remedies thus created have been held in the cases cited to be exclusive. This Act, on the contrary, provided in express terms for the preservation of all existing rights and remedies. Cases arising under the Suits in Admiralty Act, therefore, are not applicable here.

The statute here in question must be construed as written, not as it might have been written. As written, it in terms preserved all existing remedies, whether against the United States or against the Fleet Corporation, as the case might be, substituting, however, the Board for the President in the determination of just compensation in the first instance in those cases involving such determination. This is not such a case and the liability of the Fleet Corporation on these contracts is in no wise affected by the Merchant Marine Act.

Doubt likewise arises as to the constitutionality of these provisions of the Merchant Marine Act as interpreted by the petitioner. The liability of the Fleet Corporation was contractual. It is thus implicit in the petitioner's argument that one party to a contract may be required by statute to relieve the other, and accept in lieu thereof a third party designated by the legislature. As between private parties, we should assume that this could not be done. Since the Fleet Corporation was a private corporation having an identity separate from that of the United States, it would also appear to be doubtful whether its liability on existing contracts could be destroyed by legislative enactment any more than that of any other private corporation. However this

may be, the statute does not so provide, nor is it capable of such interpretation.

Respectfully submitted,

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APPENDIX.

A. Urgent Deficiency Act of June 15, 1917, c. 29, 40 Stat. 182-183, 217.

EMERGENCY SHIPPING FUND

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(*a*) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quality usually produced or capable of being produced by such person.

(*b*) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(*c*) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(*d*) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(*e*) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process

of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

* * * * *

SEC. 3. That the appropriations contained herein shall be available for the payment of obligations on account of the existing emergency incurred prior to the passage of this Act and which are properly chargeable to such appropriations.

B. Executive Order, July 11, 1917.

Delegating to the Shipping Board and the Emergency Fleet Corporation the powers granted the President by the emergency shipping legislation.

By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an Act of Congress entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said Act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requis-

tioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said Act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

WOODROW WILSON.

THE WHITE HOUSE, *July 11, 1917.*

C. Executive Order, December 3, 1918.

Delegating to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, powers granted to the President by Acts of Congress relative to the emergency shipping fund and approved on or prior to November 4, 1918.

Whereas, by Executive Order, No. 2664, dated July 11, 1917, I delegated to the United States Shipping

Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, certain powers vested in me under the section entitled "Emergency shipping fund" of the urgent deficiency appropriation act approved June 15, 1917; and

Whereas, since the issuance of said Executive order, the said powers granted in said Act have been variously affected or extended by the section entitled "Emergency shipping fund" of the urgent deficiency appropriation Act approved October 6, 1917, by Public Act No. 138, Sixty-fifth Congress, approved April 22, 1918, amending said section of said Act of June 15, 1917, and by the sections entitled "Emergency shipping fund" in the sundry civil appropriation act approved July 1, 1918, and in the first deficiency appropriation act, 1919, approved November 4, 1918, respectively:

Now, therefore, by virtue of the authority vested in me by said laws, supplementing said order No. 2664, but in no way limiting or restricting the effect thereof, or of Acts heretofore done in pursuance thereof, I do hereby delegate all the power and authority so vested in me, and do direct that—

1. The United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction; and

2. The United States Shipping Board shall have and exercise, subject to its discretion in turn to delegate such exercise as provided in said Executive Order No. 2664, all power and authority now vested in me by said laws with reference to constructed dry docks, marine railways and piers, and to constructed vessels or parts thereof or charters therein; to the operation, management, and dis-

position of such dry docks, marine railways, piers, and vessels; and to such other matters as are not herein mentioned.

3. All acts heretofore done by said corporation or by said board, with reference, respectively, to the kinds of power or authority herein delegated to each, and which could have been properly done by me under such statutes or any of them, be, and they are hereby, ratified and confirmed.

WOODROW WILSON.

THE WHITE HOUSE, *December 3, 1918.*

D. Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988-989, 990, 993.

SEC. 2. (*a*) That the following Acts and parts of Acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended by the Act entitled "An Act to amend the emergency shipping fund provisions of the Urgent Deficiency Appropriation Act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes," approved April 22, 1918, and as further amended by the Act entitled "An Act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919,

and prior fiscal years, on account of war expenses, and for other purposes," approved November 4, 1918;

(2) Section 3 of such Act of April 22, 1918;

(3) The paragraphs numbered 2 and 3 under the heading "Emergency shipping fund" in such Act of November 4, 1918; and

(4) The Act entitled "An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes," approved July 18, 1918.

(5) Sections 5, 7, and 8, Shipping Act, 1916.

(*b*) The repeal of such Acts or parts of Acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, hereinafter called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (*c*) of this section, as if this Act had not been passed.

(3) The repeal shall not have the effect of extinguishing any penalty incurred under such Acts or parts of Acts, but such Acts or parts of Acts shall remain in force for the purpose of sustaining a prosecution for enforcement of the penalty therein provided for the violation thereof.

(4) The board shall have full power and authority to complete or conclude any construction work begun in

accordance with the provisions of such Acts or parts o
Acts if, in the opinion of the board, the completion o
conclusion thereof is for the best interests of the Unite
States.

(*c*) As soon as practicable after the passage of thi
Act the board shall adjust, settle, and liquidate all mat
ters arising out of or incident to the exercise by o
through the President of any of the powers or dutie
conferred or imposed upon the President by any suc
Act or parts of Acts; and for this purpose the board
instead of the President, shall have and exercise any o
such powers and duties relating to the determination an
payment of just compensation: *Provided,* That any per
son dissatisfied with any decision of the board shall hav
the same right to sue the United States as he would hav
had if the decision had been made by the President of th
United States under the Acts hereby repealed.

* * * * *

SEC. 4. That all vessels and other property or in
terests of whatsoever kind, including vessels or propert
in course of construction or contracted for, acquired b
the President through any agencies whatsoever in pur
suance of authority conferred by the Acts or parts o
Acts repealed by section 2 of this Act, or in pursuanc
of the joint resolution entitled "Joint resolution author
izing the President to take over for the United State
the possession and title of any vessel within its jurisdic
tion, which at the time of coming therein was owned i
whole or in part by any corporation, citizen, or subjec
of any nation with which the United States may be a
war, or was under register of any such nation, and fo
other purposes," approved May 12, 1917, with the ex
ception of vessels and property the use of which is in th
opinion of the President required by any other branch
of the Government service of the United States, are

hereby transferred to the board: *Provided*, That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this Act.

* * * * *

SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.